No. 8433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. D. BELL,

Appellant,

vs.

APACHE MAID CATTLE COMPANY, a Corporation, BABBITT BROTHERS TRADING COMPANY, a Corporation, THE ARIZONA LIVESTOCK LOAN COMPANY, a Corporation, and H. V. WATSON,

Appellees.

APPELLANT'S REPLY BRIEF

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PAUL P. O'BRIEN

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REPLY BRIEF

With respect to Proposition I of our opening brief ("The Amended Bill of Complaint states a cause of action within the equity jurisdiction of the District Court for relief by way of specific performance of the contract alleged") all contentions of the appellees but one have been considered in our opening brief. We consider here only the contention of appellees that appellant

has been guilty of laches, and the effect thereof is not cured by a general allegation of fraud.

We respectfully submit that the allegations of the complaint do not disclose laches on the part of the appellant. As admitted by appellees (p. 20 appellees' brief) the amended bill of complaint does not disclose the exact date of the breach of the contract by appellees. Consequently there can be no showing of undue delay. It does appear that after discovery of the breach appellant sought to procure performance of the contract by appellees without the necessity of an action. Such conduct is not laches.

The purpose of the doctrine of laches is to promote not to defeat justice, and the applicability of the doctrine depends upon the circumstances of each case.

> *Kansas City Southern R. Co. v. May,* 2 Fed. 2d 680.

> "The test is not time, but whether the situation of the parties is so changed as to render prosecution of a suit inequitable, and this test has been adopted by a majority of the courts dealing with the subject."

> *Mason v. McFadden,* 298 Fed. 384, 391.

> *Kansas City Southern R. Co. v. May,* supra.

In their argument under Proposition II ("If equity jurisdiction is wanting, the Amended Bill of Complaint states a cause of action at law for damages for breach of contract and the cause should have been transferred to the law side and not dismissed") appellees have pre-

sented some contentions not considered in our opening brief and to which we now reply.

It is first contended by the appellees that the amended bill of complaint does not state a cause of action because of the indefiniteness and uncertainty of the provisions of the contract as to the particular range rights to be relinquished and because there is no allegation that appellant at any time attempted to run or obtain the right to run 960 head of cattle.

There is no uncertainty as to the contract upon which the action is based. In paragraph V of the amended bill (p. 8 Tr. of Rec.) it is alleged that the defendants agreed to sell, and plaintiff to buy, the patented land and improvements of the defendants on the National Forest together with sufficient range rights to graze, run and maintain throughout the year not less than 960 head of cattle net, the sale of grazing rights to be by relinquishment. That plaintiff agreed to, and did, pay the defendants $2,830 for the patented land, $4,700 for the improvements, and $16 per head of cattle for which grazing rights were relinquished to appellant. The fact that the location of the range rights to be relinquished was not described by metes and bounds does not in an action at law render the contract invalid for uncertainty. The appellees held certain range rights and agreed to relinquish a part thereof to appellant. Suppose the appellees had agreed to sell appellant 960 head of cattle and received payment therefor but delivered only 640, would it be held that the contract was void for uncertainty and appellant could not recover the money paid for the cattle not delivered

because the contract of sale did not specifically describe by color, etc., each of the cattle sold? The situation here is identical.

And in paragraph VIII of the Amended Bill *it is alleged* that appellant attempted to obtain the right to run 960 head of cattle, and was refused.

Second, appellees contend that the contract is illegal and void because prohibited by Regulation G-9 of the Forest Regulations.

Regulation G-9 prohibits the sale of a *permit* for a valuable consideration. Regulation G-9, however, expressly provides for the transfer, by means of relinquishment of preference rights, of permits to purchases of permitted stock or the dependent, commensurate ranch property of an established permittee. Where such transfer is a part of a bona fide sale of the permitted stock or commensurate ranch property it is within the express provisions of Regulation G-9. Appellant purchased under a bona fide sale the ranch property and improvements of the defendants together with a relinquishment of range rights by appellee sufficient to graze 960 head of cattle. Appellees performed the contract to the extent of relinquishing range rights sufficient to graze 640 head of cattle and *this was approved by the Forestry Service*. What better interpretation of the Forest Regulations than that of the Forestry Service itself? (See paragraphs VIII and IX Amended Bill-- p. 10 and 11, Tr. of Rec.)

Third, and finally, appellees contend that "under the facts in the case, if an action at law were properly stated, Equity Rule 22 would not apply."

The substance of the contention of the appellees here seems to be that no request on the part of the appellant that the cause be transferred to the law side of the court appears in the record and, therefore, this appellant having elected to stand upon his pleading the question of the duty to transfer the cause to the law side cannot now be presented.

In this the appellees overlook the first ground of their motion to dismiss, to-wit:

> "That the amended bill of complaint does not state facts sufficient to constitute a valid cause of action *at law* or in equity against said defendants or against any of them." (Italics ours.) (Tr. of Rec., p. 14).

Thus the sufficiency of the amended bill to present a cause of action *at law* was directly raised by the motion of appellees to dismiss, and presumably was considered and passed upon by the court in ruling on said motion.

In *American Land Co. v. City of Keem*, 41 Fed. 2d 484, cited by appellees, will be found a very well reasoned dissenting opinion.

As shown by the cases cited in our opening brief the question has been determined by this Court adversely to appellees' contention.

In conclusion, the Court will, of course, recognize that appellees' argument as to laches can have no application to the action at law. No statute of limitations is pleaded, nor does it appear that any statute of limitations has run.

Respectfully submitted,

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